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Thinking ahead for Europe

Fixing the Services Directive

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1. Introduction

In the spring of 2004, the European Commission approved a draft Directive on Services in the Internal Market and sent it to the Council and the European Parliament.[1] The proposal is the cornerstone of the ailing Lisbon strategy to revive growth and jobs in the European Union: services account for 70% of GDP and employment in advanced countries, and their performance is a main determinant of overall productivity and employment growth. In the European Union, the markets for services are still organised along national lines, cross border trade remains relatively underdeveloped[2] and competition is scarce. The productivity gap with the United States is largely explained by these obstacles.[3]

The proposal met with widespread opposition; at a time of declining popularity of Community institutions, the member states and the Commission vacillated, slowing the decision process in the Council. Eventually, the initiative was seized by the European Parliament, which in February 2006 has published its position containing a number of far-reaching amendments,[4] supported by the two main political groups. These amendments have clarified and improved the Commission's proposal in various important aspects, but certain provisions are unacceptable in view of preserving and enhancing the Internal Market.

The Commission has now published its amended proposal that goes quite a way in the direction advocated by the European Parliament, while rejecting some specific suggestions that appear contrary to Community law or would weaken the directive excessively,[5] and the Council has supported the Commission proposal, with only two minor changes.

A good compromise is in sight; however, some further changes would still seem necessary. This Policy Brief reviews the Commission proposal, the Parliament's position, and the Commission and Council revised proposals, against the background of the present situation without the directive.

2. Barriers to free supply of services in the Internal Market

In a report published in 2002, the European Commission drew up an inventory of regulatory and administrative barriers in the Internal Market for services that hamper the freedom of establishment and the free provision of services cross-border.[6] In modern economies, services are ubiquitous and there is an ever-growing variety of new services, ranging from traditional activities such as distribution, transport and tourism, finance, and the regulated professions, to new services such as data processing, technical analysis and testing, business consulting, waste management and energy conservation.

Due to their intangible nature, the difficulty for the recipient to assess properly the quality of the service received and the importance of the skills of the service provider, services are usually subject to complex rules not only on the service itself, but also on the service provider – covering such things as his or her qualifications, reliability and technical and financial strength. Furthermore, many services require the physical presence of the provider where the service is delivered, possibly accompanied by his staff and equipment; in this case, he or she will typically have to meet duplicate

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[1] COM(2004) 2 of 5 March 2004.

[2] D. Gros, "EU Services Trade: Where is the Single Market for services?", CEPS Commentary, February 2006 (downloadable at http://www.ceps.be).

[3] R.H. McGuckin and B. van Ark, "Productivity, Employment, and Income in the World's Economies: Performance 2004", The Conference Board, New York.

[4] Position of the European Parliament, EP_PE_TC1-COD(2004)0001, PE 369.610, 16 February 2006.

[5] COM(2006) 160 of 4 April 2006.

[6] The State of the Internal Market for Services: Report from the Commission to the Council and the European Parliament, COM(2002) 441 of 30 July 2002.

regulatory requirements imposed by the country where the service is provided.

In the EC Treaty, services represent a residual category: everything that is sold for remuneration and is not governed by the provisions on the free movement of goods, capital and persons (Art. 50).

Barriers to establishment may result from a requirement to obtain an authorisation, possibly involving a duplication of conditions already met in the home country as well as lengthy and discretionary procedures; from professional qualifications and certificates necessary for the exercise of an activity; from restrictions on the legal form and ownership structure of the service provider. Entry and competition may also be restricted by zoning, licensing rules, regulation of prices, restrictions on the scope of activities and shop-opening hours. Detailed rules typically govern commercial communications for the promotion of professional services, from outright bans to strict limits on content. The special rules that typically apply to the provision of public services – which in principle should be consistent with the Internal Market and competition rules – may also discourage entry by foreign competitors.

The sale of services cross-border may be hindered by other restrictions, including a requirement to be established in the country of sale, and authorisation, registration and declaration requirements that combine with rules on professional qualifications and other conditions for the exercise of an activity. A variety of restrictions may also limit the possibility of bringing one's own staff to the country where the service is provided or purchasing intermediate services in the country of origin. Yet other obstacles may arise from divergent contract laws and rules on after-sale service, professional liability and insurance, as well as tort settlement.

An important issue in this context is represented by the lack of confidence amongst consumers, who may be reluctant to purchase services from foreign suppliers due to insufficient transparency of conditions of sale and after-sale service, and weak or uncertain protection from abusive behaviour by the service provider.

3. The Internal Market rules on the provision of services

Before discussing the Commission's proposal and the Parliament's amendments, it seems worthwhile to review the present state of affairs in internal market rules for services.

Regulatory restrictions on services are forbidden by Arts 43 (freedom of establishment), 49 (freedom to provide services) and 56 (free movement of capital) unless they are justified by express derogations or an 'imperative' public interest. Art. 86 should also be mentioned; in the case of public undertakings or undertakings holding special or exclusive rights, it requires member states to avoid enacting or maintaining in force any measure contrary to the rules of the Treaty, in particular competition rules.

The European Court of Justice (ECJ) has developed in this context a 'rule of reason' for the justification of restrictions that is akin to '*Cassis de Dijon'*, whereby restrictive measures must be justified by an 'imperative' public interest, and must be necessary and proportionate for the protection of that interest. However, the Court's willingness to accept public interest justifications has been somewhat broader than in the domain of goods as a reflection of the special nature of services and the relevance of various public policy concerns.[7]

Art. 43 covers both primary establishment, i.e. setting up an independent activity in a country different from one's country of origin, and secondary establishment, i.e. setting up a new professional operation while maintaining the original establishment in the country of origin. It applies to natural (individuals) as well as legal entities (companies).

For individuals, the cornerstones of ECJ case law are in *Gebhard*[8] and *Vlassopulou.*[9] Under the first decision, national measures liable to *hinder or make less attractive* the exercise of the fundamental freedoms guaranteed by the Treaty are legitimate when they meet four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements of general interest; they must be suitable for the attainment of that objective; and must not go beyond what is necessary in order to attain it. The second decision deals with mutual recognition of professional qualifications, ruling that "national requirements concerning qualifications may have the effects of hindering nationals of other member states in the exercise of their right of establishment … if the national rules in question took no account of the knowledge and qualifications already acquired by the person in question in another member state". Thus the host state is required to compare the applicant's qualifications with those mandated by national rules, and must accord mutual recognition when those qualifications, albeit different, can be deemed to be 'at least equivalent'. Other decisions have made it clear that non discrimination also applies to access to facilities required to pursue the self-employment activity, i.e. renting premises,[10] to taxation[11] and even to residence criteria.[12]

As to legal persons, the Court has concentrated its decisions mostly on defending the freedom to set up a

[7] The exposition is based on C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press, 2004, especially chapters 12 and 13.

[8] Case C-55/94.

[9] Case C-340/89.

[10] Cases 63/86 and 305/87.

[11] C-80/94.

[12] C-107/94.

secondary establishment and ensuring that, once set up, it enjoys the same opportunities available to national companies. However, to the extent that freedom of establishment is not violated, the provision of services by foreign companies is regulated by the host-country law and national markets may remain segmented by national rules.

Turning to freedom to provide services cross-border, as has been mentioned, Community rules apply to services provided for remuneration. Thus, services provided freely by the State as part of the welfare state fall outside the scope of Art. 49; much of the public discussion surrounding the services directive seemed unaware of this distinction.

In *Sager* and *Gouda,*[13] the ECJ ruled that restrictions on the free movement of services may arise not only from overtly discriminatory measures, but also from the application of national rules to a foreign service provider who already has to comply with his national legislation. Therefore, the application of host-country rules to the foreign service provider must be justified by an overriding public interest, under the usual necessity and proportionality tests; it must also be shown that protective goals of the host-country legislation are not already satisfied by the national rules of the service provider. Over time, the ECJ has increasingly applied a more general test, whereby non-discriminatory measures may breach Art. 49 when they are liable to "prevent or substantially impede" access to the market.[14]

The ECJ requires that the measures taken to protect a public interest must be proportionate, i.e. adequate and not excessive for the pursuit of that goal. However, it has applied the proportionality test more leniently when confronted with politically sensitive subjects,[15] leaving broad room to the member states to introduce measures for reasons of public interest.

When a local presence is necessary to provide the service, providers must be granted the freedom to enter the host country and bring along their staff and equipment. The key factor distinguishing service provision from establishment is the duration of stay.[16] In *Rush Portuguesa,*[17] the ECJ not only upheld the right of a foreign company to bring its own staff, but also ruled that the member states could not make the movement of staff subject to restrictions such as an obligation to obtain a work permit or be hired locally. On the other hand, these foreign workers are not allowed to seek access to the labour market of the host country and must depart when the service contract is terminated. Furthermore, the law of the host state and collective labour agreements regarding working conditions, i.e. minimum wage, working hours and equal treatment – but not those on health, social security and other social assistance – apply to posted workers, even in the case of short-term assignment. This decision opened the way to the Directive on Posted Workers (96/71): a fact often overlooked in the public debate on the services directive.

Art. 56 can be applied, mostly in connection with Art. 43, to ensure that direct investment is not discouraged.

Art. 86 applies Community rules on competition and free movement to public undertakings or undertakings that have been granted special or exclusive rights for the provision of specific public services, e.g. postal services and water distribution. The member states are free to decide what is of general public interest – i.e. which services are subject to public service obligations, typically universal service requirements entailing access for everybody to the service in question at a fair price and adequate quality. However, the means chosen for the pursuit of this public interest are subject to a scrutiny of necessity and proportionality.

Under these principles, the member states have been able to maintain both the public ownership of companies and complex restrictions in the supply of public services.

To complete the picture, the case law on the primacy of Community law requires that any provision in national law that contravenes a Treaty rule must be 'disapplied' not only by national courts, but also by all state bodies including administrative authorities. This opens the way to direct action by individuals to challenge national rules in contrast with the Treaty before various national jurisdictions.[18]

Although the ECJ has done a remarkable job in upholding the principles of free establishment and provision of services, the direct application of Treaty rules by the courts will not suffice in bringing about a fully-functioning Internal Market for services, owing both to the cost and complexity of judicial procedures, and the fact that in many cases national regulations are not obviously in contrast with Community principles, since they do have some *prima facie* public interest justification.

In a number of areas it has been possible to enact sectoral directives establishing a 'single passport' for the exercise of certain activities, notably financial services, and imposing minimum standards of protection for recipients as well as administrative cooperation between national authorities for their application. A number of sectoral

[13] Cases C-76/90 and C-288/89.

[14] Cf. Cases C-384/93 and C-275/92.

[15] For example, a Finnish law granting exclusive rights to run slot machines that prevented a British company from operating its slot machines in Finland was upheld in view of the moral aspects involved in permitting an unfettered expansion of gambling (case C-124/97; see also a similar case C-275/92).

[16] Also in the Gebhard decision, cited above.

[17] C-113/89.

[18] An important application of this principle is in ECJ decision on *Consorzio Industrie Fiammiferi vs. Autorità garante della Concorrenza e del Mercato* (case C-198/01 of September 2003) where this obligation was upheld in a competition case involving the application of Art. 81 of the Treaty.

directives have also laid down minimum standards on training for individual professions, e.g. doctors and nurses, lawyers and architects. However, not only were these directives painfully long to negotiate, but they also became rapidly obsolete in view of the changing nature and content of professional activities. For this reason, since 1989 a number of 'horizontal' directives have purported to establish general rules for the recognition of professional qualifications. Recently, sectoral and horizontal directives have been consolidated in Directive 2005/36 on the recognition of professional qualifications.[19] This directive lays down the criteria for the mutual recognition of qualifications, which must be granted (almost) automatically when those criteria are met.

It should be noted that only in a few cases, namely e-commerce and insurance, and always following extensive harmonisation of protection rules, has it been possible to shift from mutual recognition – which can be refused by host-country authorities for legitimate public interests – to exclusive application of the rules of the country of origin barring any additional regulatory requirements by the host country on a foreign service provider.

4. The Commission's proposal

The foregoing discussion shows that ECJ judgements and sectoral directives hardly offer a viable route to the completion of the Internal Market, since services include dozens of heterogeneous, ever-changing activities. Several barriers are horizontal and cumulative. Moreover, the member states insist on applying the same regime to service providers who want to establish in their territory and those who want to provide services from their home base.

This is why the Commission has chosen a horizontal approach, based on administrative simplification, the identification of typical restrictions extensively used in the regulation of services, the application of country-of-origin rules to the cross-border provision of services (with derogations), while maintaining a high level of protection of consumers through various confidence-building measures, including obligations of mutual assistance and cooperation between national authorities.

(a) Scope of the directive

Financial services, electronic communications and transport services, already covered by other directives, are excluded from the scope of the draft directive, and so are taxation rules. Non-economic services of general interest are also excluded, since they are not provided for remuneration.

Some services of general economic interest – i.e. postal services and electricity, gas and water distribution – are covered by the directive: more precisely, they are subject to the procedural and substantive rules on establishment, as will be described below, while they are exempted from application of the country-of-origin principle valid for the free provision of services cross-border.

This aspect has been controversial, but in practice it only has the effect of reaffirming principles already implicit in Art. 86 of the Treaty. The freedom of the member states to define what they consider services of general economic interest and how they should operate, would not be affected. Nor would there be any new privatisation or liberalisation obligations.

(b) Freedom of establishment

The directive contains two sets of provisions dealing respectively with authorisation procedures and regulatory restrictions. Moreover, it sets up a system of mutual evaluation and notification of the restrictions to the freedom of establishment.

Authorisation procedures. The barriers resulting from complicated and non-transparent authorisation procedures are particularly harmful since they usually combine with broad discretion in the application by national, regional and local authorities. The directive provides for administrative simplification, including the requirements to set up single points of contact and on-line procedures; the elimination of unjustified authorisations, to be replaced as much as possible by rules of access based on objective criteria; and the introduction of standards of transparency for administrative procedures. These rules would be enormously beneficial, since they would make decision-making fully transparent and they would force administrative authorities to make their goals explicit. For this reason, opposition by the member states, while not very visible or vocal, has been widespread and sturdy under water.

Substantive restrictions to the freedom of establishment. The provisions in the directive represent a direct development of the case law that prohibits restrictions unless they can be proved to be necessary and proportionate for a public interest. The directive identifies a list of restrictions that are always prohibited ('black list'). These restrictions, for example, include making the authorisation subject to a case-by-case proof of the existence of an economic need or a market demand; the involvement of competitors in the procedure for authorisation to enter a market; a general prohibition of advertising by regulated professions. An even more important 'grey list' singles out other potentially restrictive rules which should be eliminated by the member states unless they can be shown to respond to a public purpose, and to be necessary and proportionate for that purpose. These measures include for example quantitative or territorial restrictions to the access to a service activity; minimum or maximum tariffs; the obligation to take a specific legal form or restrictions on the shareholding of a company; requirements other than

[19] With the exception of lawyers, that are regulated by two specific directives, 77/249 and 98/5.

those concerning professional qualifications that reserve access to a service activity to particular providers; and restrictions on the multidisciplinary activities, i.e. the joint supply of services. The most controversial aspect here has been the very notion of a 'grey list' that would force all administrations to justify their measures under strict tests of public interest.

Mutual evaluation and notification of restrictions. Each member state shall present a report to the Commission on its authorisation systems and regulatory restrictions included in the grey list that it will maintain, demonstrating their compatibility with Community rules. These reports will be forwarded to all member states and will be subject to mutual evaluation. Moreover, the introduction of new restrictions included in the grey list has to be notified to the Commission and reviewed under a Community procedure. The notification and mutual evaluation procedure is essential to bring out in the open and subject to review all measures potentially violating Community law.

As is apparent, these provisions do not entail any new legal principle since they basically incorporate general principles already established by the ECJ in its decisions. However, by imposing transparent procedures and a systematic review of restrictions, which would have to be notified to the Commission and the member states and justified one by one, they would strengthen the presumption in favour of free movement and open access. For instance, many existing barriers to entry in commercial distribution, professional and personal services would in all likelihood not pass such a scrutiny.

(c) Freedom to provide services cross-border

The proposed directive envisages a shift from the prevailing system of mutual recognition to general application of the country-of-origin rules, with a list of derogations. This proposal has proven the most controversial, perhaps not without reason since it entails that services provided by residents of other member states would have direct access to all national markets of the Union without any scrutiny by national authorities; the responsibility of supervising service providers would belong to the member state of origin. A further, much feared implication is that service providers from member states with lax labour protection would be free to import their workers and labour laws in the host country, thus undermining the more 'cohesive' social protection systems. And there is fear that consumers will be misled to enter contracts that they do not fully understand or that provide insufficient protection against abuse.

These concerns are to an extent exaggerated but not groundless.

Under the proposed country-of-origin principle, the member state could not impose on the foreign service provider any one of a long list of requirements, including an obligation to establish in its territory, to obtain an authorisation, and to comply with requirements relating to the exercise of the service activity in question applicable in its territory (Art. 16, paragraph 3). However, Art. 17 contains a long list of derogations that excludes from application of the principle all matters already regulated by specific directives, including the main services of general economic interest, the recognition of professional qualifications, the rules on the posting of foreign workers and all acts involving a notary.

More importantly, the proposed directive excluded "all contracts for the provision of services concluded by consumers to the extent that the provisions governing them are not completely harmonised at Community level". Thus, the country-of-origin principle, as proposed by the Commission, would only directly affect business-to-business transactions, while national rules on consumer protection would still apply to contracts signed by them. However, one cannot exclude that consumers could suffer indirectly from lower protection, for example in cases in which, while not purchasing the service, they were the final users of the resulting product or facility – say, a bridge project or an electronic distribution security system.

The country-of-origin principle would not apply to most services of general economic interest, because either they were explicitly excluded from the directive (as for transport and communication services), or the application of the principle was excluded by a derogation (as for postal services, water and gas). Some of these services were included in the directive, but only with the purpose of improving transparency.

And yet, the application of country-of-origin rules does raise legitimate concerns in that they make the law of a foreign country directly applicable within domestic markets and service providers are only supervised by a foreign authority. It is interesting to note, in this regard, that the opposition to country-of-origin has been led by two groups that traditionally have had very different social and political preferences, i.e. members of the liberal professions and unionised workers. While to an extent this may reflect a reaction to a perceived loss of protection, one cannot reject the alternative possibility that legitimate concerns of public interest may be threatened.

For instance, almost everywhere in the European Union professional associations have traditionally performed an important role in defending standards of service and ethics, and this role may be weakened by straight application of country-of-origin rules. The unions also seem to have a point: the decision to open some markets for services, such as construction, where national labour laws are already under considerable strain due to cheap immigrant labour, may entail important social implications – including for pension and other social assistance benefits – that must be fully understood.

Once these objections are recognised, one wonders whether indeed the country-of-origin principle is absolutely necessary. After all, mutual recognition seems

able to ensure the same substantive results in almost every circumstance, as ECJ decisions have repeatedly shown, but maintains a degree of domestic scrutiny on services and service providers as they enter national markets. In general, to the extent that enhanced competition applies not only to economic activities but also to social norms and standards of protection, great caution seems justified.

(d) Posting of workers

The Posting of Workers Directive (96/71/EC) – which will continue to apply – provides that posted workers, including temporary workers, be subject to the rules on working conditions of the host member state. Rules on working conditions cover such matters as the minimum wage, the working time and the minimum rest periods, the minimum paid leave, the protection of temporary workers, health, hygiene and safety standards, the rules for the protection of young people and pregnant women, equal treatment of men and women, and various other provisions on non-discrimination. All these matters are excluded from application of the country-of-origin principle. On the other hand, hiring and firing conditions, social security and complementary pension schemes are not covered by Directive 96/71. This is the aspect that was met by the harshest criticism throughout the EU. However, it is not immediately clear how the host country rules on these matters could be extended to posted workers, who by definition will return to their country of origin at the end of the service. Finally, a justifiable concern is how to ensure an effective administrative supervision of the rules for the protection of posted workers. The host member state is entitled to carry out in its territory checks, inspections and investigations necessary to ensure compliance with Directive 96/71. On this, the proposed directive on services has tried to simplify the administrative burdens on service providers who post workers by abolishing the requirement for service providers to obtain prior authorisation from the host country, as well as the obligation to ship labour documents to the place of posting and to designate a representative established in the host country. These simplifications have met strong opposition, since it is feared that they would excessively weaken the ability of host countries to control these temporary immigrants.

(e) Consumer protection

As already mentioned, the country-of-origin principle would not apply to consumers contracts. Therefore, the applicable law is determined by Art. 5 of the 1980 Convention of Rome, whereby consumer contracts are governed by the law of the country where the consumer keeps his or her habitual residence.

An important barrier to cross-border provision of services is a lack of trust by consumers in providers established in other member states. Indeed, consumers may find it exceedingly difficult to collect sufficient information about the service provider and the quality of services. Lack of understanding of contract clauses and redress procedures, in case of dispute, may also discourage cross-border purchases of services.

For this reason, the proposed directive contains a number of provisions aimed at strengthening consumer confidence: the obligation for service providers to make easily available information about themselves, their services and after-sale guarantees; mandatory professional liability insurance and guarantees for services that present particular risks for recipients; measures to facilitate settlement for cross-border disputes, including the obligation to supply contact details to receive complaints, respond swiftly, and make best efforts to find satisfactory solutions; and a system of information exchange and administrative cooperation between the member states' supervisory authorities in the interest of recipients. These provisions are not controversial and command universal support.

5. The amendments of the European Parliament

The European Parliament has modified the Commission's proposal in depth. Many of its amendments provide useful clarification of the scope of the directive and will help reassure a fearful public opinion.

A number of amendments are aimed at strengthening the protection of posted workers and labour conditions in the host states, e.g. by excluding temporary work agencies from the scope of the directive and reinstating certain obligations and controls on service providers that use posted workers. New provisions make it clear that the directive does not prevent the member states from applying terms and conditions of employment on matters other than those listed in Directive 96/71 on the posting of workers, and more generally will not affect labour and social security laws.

Also, a number of services are excluded from the scope of the directive for their prominence in societal values and preferences, e.g. security and health, audiovisual and gambling activities. Services of general economic interest are also expressly excluded from application of the rules for the free provision of services. At all events, the services directive would not have entailed new liberalisation obligations in these matters, which are already regulated by specific directives.

More generally, Parliament clarified the relationship between the directive and other provisions of Community law; in case of conflict, specific and sectoral Community rules will prevail. This would be the case, notably, for legal services.[20]

Parliament has also struck out from the directive the country-of-origin principle. Instead, the new text asserts the right of service providers to provide a service in a

[20] Cf. footnote no. 19.

member state other than that in which they are established and the obligation of the member states to ensure free access and free exercise of a service activity within their territory.

It specifies, in accordance with ECJ case law, that access or exercise of a service activity may not be made subject to requirements that are discriminatory or do not meet the standard necessity and proportionality tests. The list of restrictions that may not be imposed on service providers already contained in the Commission's proposal is maintained – including the obligation to have an establishment in their territory, obtain an authorisation except when provided for by Community law, set up a certain infrastructure or apply specific contractual arrangements. Equally in line with ECJ case law, the Parliament proposal allows the member states to impose requirements on the provision of a service activity that are justified for reasons of public policy, public security, environmental protection and public health (which would no doubt be open to scrutiny by the ECJ under the usual necessity and proportionality tests).

Altogether, the system proposed here by Parliament does not represent a setback, since it incorporates all of the principles of ECJ case law, while maintaining the possibility of a national scrutiny of foreign service providers and their rules in the country of origin, as is today under mutual recognition.

One must recognise that straight application of country-of-origin rules would have entailed a radical step-change in EU regulation, going well beyond the ECJ case law and raising legitimate concerns of weakening standards of protection of recipients. Therefore, on this I would side with those who have argued that the Commission's proposal had gone too far.

Finally, Parliament usefully clarified the distribution of supervisory tasks between the member state of establishment and the member state where the service is provided. The first is responsible for the supervision of the service providers established in its territory, also when operating in another member state. The member state where the service is provided is responsible for the supervision of the activity of the service provider in its territory for matters where it may impose regulatory requirements. For other matters, it may carry out on-the-spot investigations only when this is objectively justified and non-discriminatory, or when it has been requested by the member state of establishment.

However, in three areas the Parliament's amendments would nullify the positive contribution of the directive to creating an internal market for services or even worsen the current situation: the definition and attendant application in the directive of the notion of "overriding reasons relating to the general interest"; an unjustified extension to many private services of the list of exclusions; and the weakening of the mutual evaluation and notification mechanisms provided for in the Commission's proposal.

(a) Overriding reasons relating to the public interest

The notion of overriding reasons relating to the public interest is used in several provisions as a justification for national restrictions. Parliament has provided a definition covering a long list of public policy concerns, including the conservation of social and cultural policy objectives. This may open the way to many protective devices in the field of services that today would be forbidden. The critical point is that in the ECJ case law the identification of a given concern as an "overriding reason relating to the public interest" is verified with reference to the concrete circumstances of the specific case. In other words, while each and every public interest is legitimate, the conditions under which it may justify a restriction of Treaty freedoms must be assessed case by case. The list of overriding reasons drafted by the Parliament seems to overlook this need for a case-by-case assessment and qualify the public policy concerns as *per se* overriding reasons of public interest, which may always be invoked to justify a restriction. Were this approach to be retained, challenging restrictions justified by reference to such a broad list of public policy concerns would entail an uphill battle in court against the directive itself.

In fact, this broadening of the justifications of restrictions to establishment and the free provision of services much beyond the limits set by the ECJ could well be incompatible with the Treaty, and the directive could be challenged before the ECJ under Art. 230. But in the meantime, progress in the Internal Market would suffer a serious blow, since new restrictions could be introduced based on the directive.

(b) The exclusions from the scope of the directive

The Parliament's amendments exclude from the scope of the directive a long list of activities, e.g. urban transport, taxis and ambulances, port services, those professions and activities that are permanently or temporarily connected with the exercise of an official authority in a member state (including notaries) and public and private healthcare services provided by health professionals to patients, including pharmaceutical services.

Moreover, all services of general economic interest are exempted from the evaluation procedures of 'grey list' restrictions. Since this is a directive setting general principles for services, any sectoral exclusion from its general scope or from the application of specific provisions should be strictly justified.

This condition is not fulfilled by the above formulation of exclusions proposed by Parliament.

(c) Mutual evaluation and notification of restrictions

Parliament has proposed to eliminate the obligation that member states evaluate and report under a Community

procedure all authorisation schemes and restrictions on the joint supply of services, which are often used to tame competition in services, and in general notify any new restrictions included in the 'grey list'. Were they accepted, these amendments would take away much of the pressure on the member states to screen and review regulatory and administrative barriers. The future operation of the whole system would be jeopardised.

6. The Commission's revised proposal

On April 4, the Commission has published its amended proposal, broadly endorsing the Parliament's position.

The country-of-origin principle has been replaced by the obligation to ensure free movement in services; the directive's provisions on the supply of services cross-border will not apply to services of general economic interest. The provisions on administrative simplification for the posting of workers have been deleted "as part of an overall compromise".[21] On the same date, the Commission adopted a notice to provide guidance on this issue so as to reduce undue administrative burdens and establish a better system of administrative cooperation.[22]

All the exclusions from the scope of the directive requested by Parliament have been accepted, with two notable exceptions. First, the Commission has circumscribed the exclusion of activities that are connected with the exercise of official authority: in line with Art. 45 of the EC Treaty, notaries are no longer excluded *per se* from the directive, but only for specific activities involving direct and specific participation in the exercise of official authority. Second, the obligation to evaluate the requirements of the 'grey list' for services of general economic interest is maintained, although the Commission specifies that such provision applies only in so far as this does not obstruct the performance of the particular task assigned to these services.

Moreover, the Commission has rightly rejected the amendments by Parliament aiming at removing the obligation for member states to evaluate and report on authorisation schemes and restrictions on the joint supply of services ('multidisciplinary' activities), on grounds that this obligation "is an essential measure for facilitating access to and the exercise of service activities". Similarly, the Commission has maintained the notification obligation for any new 'grey list' national measures, without which the evaluation process would have been crippled.

On the list of overriding reasons relating to the public interest introduced by the Parliament, the Commission has redrafted the Parliament's definition, specifying that it refers to "reasons recognised as such in the case law of the Court of Justice", including the reasons indicated in the list. This formulation does not eliminate the risk that the list may be read as a blanket justification for national restrictions. In reality, nothing would be lost if the list of examples of public policy concerns were dropped altogether.

7. Conclusions

The proposal of a framework directive for services addresses a critical issue for the competitiveness of the EU economy; its horizontal and all-encompassing approach would endow the Community with the appropriate instrument to tackle the enormous variety of restrictions in services that explain much of the EU lagging growth and employment.

The draft directive has run into strong and widespread opposition; many of the concerns expressed by the public opinion are worth listening to. Not much will be lost by dropping the country-of-origin principle, which was going too far. Many clarifications of the scope of the directive contained in the Parliament's opinion are useful and may help allay excessive fears in public opinion; and it is probably wise to accept some greater caution in the application of the directive to services of general economic interest, as Parliament has suggested.

However, some of the changes proposed by Parliament go too far and cannot be accepted, since they would take much of its effectiveness away. The Commission has been right in retaining certain key provisions on the mutual evaluation and notification system. The proposed exclusion from the scope of the directive of whole professions connected with the exercise of official authority has been limited to specific activities, consistently with the Treaty provisions. Regulatory restrictions which may represent an obstacle to the freedom of establishment are to remain subject to evaluation also for services of general economic interest, in so far as they do not obstruct the performance of the specific tasks assigned to these services.

The list of overriding reasons relating to the public interest proposed by the Parliament has been accepted by the Commission, with only minor clarifications. This list is superfluous since it cannot add anything new to ECJ case law. But if it were maintained, it could encourage a new wave of national restrictive measures that would be very difficult and time-consuming to dismantle in court.

Unfortunately, the Council has decided not to press this aspect and instead has basically adhered to the revised Commission proposal, with only two changes. First, it has extended to the free supply of services the notification and evaluation mechanism previously envisaged for restrictions to the freedom of establishment. Second, it has excluded notaries and bailiffs form the scope of application of the directive.

It only remains to wait for the conclusion of the conciliation procedure between Parliament and Council.

[21] Cf. Amended Commission proposal, Explanatory memorandum par. 3.6.

[22] COM(2006) 159.

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- To build collaborative networks of researchers, policy-makers and business across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

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